



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL - 9 2012

Georgette Yaindl, Esq.

West Hartford, CT 06119

RE: MUR 6344
United Public Workers, AFSCME
Local 646, AFL-CIO

Dear Ms. Yaindl:

This is in reference to the complaint you filed with the Federal Election Commission on January 17, 2011, concerning Respondent United Public Workers, AFSCME Local 646, AFL-CIO ("UPW" or "the union"). The Commission found that there was reason to believe UPW violated 2 U.S.C. § 434(g), a provision of the Federal Election Campaign Act of 1971, as amended, and conducted an investigation in this matter. On June 29, 2012, the Commission accepted a conciliation agreement signed by the respondent.

In addition, on April 5, 2011, the Commission had previously found that: (1) there is no reason to believe that United Public Workers, AFSCME Local 646, AFL-CIO violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by coercing employees to make financial contributions to Hanabusa 2010; (2) there is no reason to believe that Dayton Nakanelua, Clifford "Chip" Uwayne, and Laurie Santiago violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by directing and/or consenting to the coercion of UPW employees to make financial contributions to Hanabusa 2010; (3) there is no reason to believe that United Public Workers, AFSCME Local 646, AFL-CIO violated 2 U.S.C. § 441b(a) by making corporate in-kind contributions in the form of coordinated expenditures; and (4) there is no reason to believe that Dayton Nakanelua, Clifford "Chip" Uwayne, and Laurie Santiago violated 2 U.S.C. § 441b(a) by consenting to the making of prohibited contributions. Also on April 5, 2011, the Commission was equally divided as to the remaining allegations in the complaint. One or more Statement(s) of Reasons providing the basis for the Commission's decision will be forthcoming when the entire file in this matter closes.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Pining First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). A copy of the agreement with United Public Workers, AFSCME Local 646, AFL-CIO is enclosed for your

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Georgette Yaindl, Esq.
MUR 6344
Page 2 of 2

information, as well as the Factual and Legal Analyses, which formed a basis for the Commission's findings.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Olaya', written in a cursive style.

Phillip A. Olaya
Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analyses

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
United Public Workers, AFSCME) MUR 6344
Local 646, AFL-CIO)

CONCILIATION AGREEMENT

This matter was initiated by an externally-generated complaint. The Federal Election Commission ("Commission") found reason to believe that United Public Workers, AFSCME Local 646, AFL-CIO ("Respondent") violated 2 U.S.C. § 434(g) of the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to report independent expenditures it made to expressly advocate for the election of Colleen Hanabusa in a May 22, 2010, special election for Hawaii's First Congressional District.

NOW, THEREFORE, the Commission and Respondent, having participated in informal methods of conciliation prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondent enters voluntarily into this agreement with the Commission.

IV. The pertinent facts and law in this matter are as follows:

1. UPW is the exclusive bargaining representative for approximately 11,800 public sector employees in Hawaii.

1 2. On May 22, 2010, there was a special election for Hawaii's First
2 Congressional District.

3 3. Colleen Hanabusa was a candidate in the special election for Hawaii's
4 First Congressional District. Hanabusa 2010 was Colleen Hanabusa's principal campaign
5 committee.

6 4. Under the Act, a person that makes independent expenditures expressly
7 advocating the election or defeat of a federal candidate aggregating \$10,000 or more at any time
8 up to and including the 20th day before the date of an election must file a report describing the
9 expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A). *See also* 2 U.S.C. § 434(g)(2)(B)
10 (requiring the filing of additional reports within 48 hours for additional expenditures aggregating
11 \$10,000). The Act further requires that a person that makes independent expenditures expressly
12 advocating the election or defeat of a federal candidate aggregating \$1,000 or more after the 20th
13 day, but more than 24 hours before the date of an election must file a report describing the
14 expenditures within 24 hours. 2 U.S.C. § 434(g)(1)(A).

15 5. For both 24- and 48- Hour Notices of Independent Expenditures, the date
16 that a communication is publicly disseminated or distributed serves as the date a committee must
17 use to determine if the total amount of independent expenditures, in the aggregate, has reached or
18 exceeded the threshold for reporting. 11 C.F.R. §§ 104.4(f) and 104.5(g)(1)-(2).

19 6. Between March and May 2010, UPW conducted an independent
20 expenditure campaign effort expressly advocating the election of Colleen Hanabusa.

1 7. Between March and May 2010, UPW disbursed \$14,231.37 for employee
2 campaign activities that expressly advocated the election of Colleen Hanabusa, including sign-
3 waving, working a phone bank, and canvassing.

4 8. UPW disbursed \$26,260.72 for two radio ads expressly advocating the
5 election of Colleen Hanabusa or the defeat of her opponent. One of the ads aired from April 27
6 to May 5, 2010. The second ad aired from April 29 to May 6, 2010.

7 9. UPW did not report to the Commission that it made any independent
8 expenditures expressly advocating the election of Colleen Hanabusa.

9 10. UPW contends that it did not recognize these expenditures were reportable
10 under the Act. UPW contends that its failure to report these expenditures resulted from a good
11 faith mistake and that it did not intend to violate the law.

12 11. UPW was required to report both the expenditure for the radio ad that
13 aired April 27, 2010, and the expenditures for employee campaign activities through April 27,
14 2010, in the same 48-hour notice. See 11 C.F.R. §§ 104.4(f), 109.10(c).

15 12. UPW was required to file an additional 48-hour notice for the second radio
16 ad that aired on April 29, 2010, at a cost of \$12,827.22, plus an additional \$2,266.33 in
17 expenditures for employee campaign activities on April 28-29, 2010. See 11 C.F.R. §§ 104.4(f),
18 109.10(c).

19 13. UPW was required to file a 24-hour report on May 4, 2010, to report
20 expenditures for employee campaign activities expressly advocating the election of Hanabusa
21 that exceeded the \$1,000 threshold. See 11 C.F.R. § 109.10(d).

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1 V. Respondent violated 2 U.S.C. § 434(g) by failing to report \$40,492.09 in
2 independent expenditures expressly advocating the election of Colleen Hanabusa.

3 VI. 1. Respondent will pay a civil penalty to the Federal Election Commission in
4 the amount of five thousand five hundred dollars (\$5,500), pursuant to 2 U.S.C. § 437g(a)(5)(A).

5 2. Respondent agrees it will not violate 2 U.S.C. § 434(g).

6 3. Respondent will file the relevant disclosure reports to accurately reflect
7 the independent expenditures referenced at paragraphs IV.8-9.

8 VII. This conciliation agreement, unless violated, is a complete bar to any further
9 Commission action against Respondents in connection with the facts raised in the Complaint.
10 See 2 U.S.C. § 437g(a)(4).

11 VIII. The Commission, on request of anyone filing a complaint under 2 U.S.C.
12 § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance
13 with this agreement. If the Commission believes that this agreement or any requirement thereof
14 has been violated, it may institute a civil action for relief in the United States District Court for
15 the District of Columbia.

16 IX. This agreement shall become effective as of the date that all parties hereto have
17 executed same and the Commission has approved the entire agreement.

18 X. Respondent shall have no more than 30 days from the date this agreement
19 becomes effective to comply with and implement the requirements contained in this agreement
20 and to so notify the Commission.

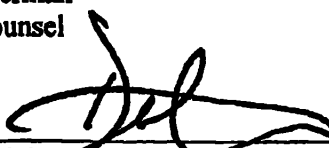
21 XI. This Conciliation Agreement constitutes the entire agreement between the parties
22 on the matters raised herein, and no other statement, promise, or agreement, either written or

1 oral, made by either party or by agents of either party, that is not contained in this written
2 agreement shall be enforceable.

3 FOR THE COMMISSION:

4 Anthony Herman
5 General Counsel

6
7
8 BY:

9 
10 Daniel A. Petalas
11 Associate General Counsel
12 for Enforcement

7/6/12
Date

13 FOR THE RESPONDENT:

14 
15 Dayton Nakanelua
16 State Director
17 United Public Workers, AFSCME Local 646, AFL-CIO
18
19

6/14/10
Date

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: United Public Workers, AFSCME MUR: 6344
Local 646, AFL-CIO

I. FACTUAL BACKGROUND

A. Introduction

This matter concerns Georgette Yaindl's allegations that Respondent United Public Workers, AFSCME Local 646, AFL-CIO and union managers Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago ("UPW" or "the union") coerced union employees to support Hawaii First Congressional District candidate Colleen Hanabusa's candidacy in a special congressional election on May 22, 2010, and then fired Ms. Yaindl and another UPW employee, Terry Lau, when they refused to comply. Respondents deny that they coerced employees to participate in union-sponsored pro-Hanabusa campaign activities, but alternatively argue that after *Citizens United v. FEC*, 130 S. Ct. 876 (2010), they could have legally compelled its employees to do so.

UPW is the exclusive bargaining representative for approximately 11,800 public sector employees in Hawaii. See UPW Response at 3. UPW's staff consists of approximately 39 employees. See *id.* at 4. Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago are all union managers. The union operates a registered state PAC, but does not have a federal PAC. *Id.* at 3 (citing Ex. 5). UPW acknowledges it is a "political entity" that endorses candidates and "plan[s], organiz[es], and coordinat[es] a wide range of political actions," including "sign-waving, coffee hours, friend-to-friend

1 cards, phone banking, mail-outs, house-to-house canvassing, [and] rallies” to support
2 those candidates. *Id.*

3 Hanabusa 2010 is the principal campaign committee of Colleen Hanabusa, then a
4 member of the Hawaii Senate and a candidate in the May 2010 special election in
5 Hawaii’s First Congressional District. *See* Amended Statement of Organization, dated
6 Oct. 28, 2009. The Committee’s disclosure reports do not reflect receipt of any financial
7 or in-kind contributions from UPW, UPW’s State PAC, or any UPW employees.
8 Further, neither UPW nor its State PAC filed any independent expenditure or
9 electioneering communications reports as to activities in support of Hanabusa.

10 Georgette Yaindl, Esq., is a licensed attorney in Hawaii. Complaint at ¶ 1. She
11 worked as a staff attorney for UPW from August 27, 2007, until April 16, 2010, when
12 UPW terminated her. *Id.* at ¶¶ 4, 30 and Ex. 1; UPW Response at 4 and Ex. 9.

13 Terry Lau was a lobbyist for UPW. Complaint at ¶ 34; UPW Response at 4 n.2.
14 He worked for UPW until April 16, 2010, when UPW terminated him. UPW Response
15 at 4 n.2 and Ex. 18.

16 **B. UPW’s Campaign Activities**

17 In mid-to-late March 2010, UPW e-mailed its employees a notice that the union
18 would sign-wave to support Hanabusa every Friday at 4:30 p.m. *See* Complaint at ¶ 8.
19 Then, UPW required all employees to attend a staff meeting on April 5, 2010, at which
20 the union asked employees to support Hanabusa 2010 by sign-waving, phone banking,
21 canvassing, and making financial contributions to the Committee. *See id.* at ¶¶ 12, 16.
22 The union notified employees by e-mail about the mandatory meeting “[s]ometime
23 within ten (10) or so days prior to April 5, 2010,” and required employees to formally

1 request and obtain approval from Mr. Nakanelua if they were unable to attend. *See id.* at
2 ¶ 12. Except for three or four employees, including Mr. Lau, the entire staff was in
3 attendance, including executive staff, business agents, receptionists, clerks, and UPW's
4 custodian. *See id.* at ¶ 14. The union's campaign to support Hanābusa was similar to
5 previous instances when the union had asked employees to participate in political
6 campaign activities for state and local candidates. *See id.* at ¶ 6. Ms. Yaindl states that
7 she did not participate in any of these prior campaign-related activities for state and local
8 candidates, and UPW Executive Assistant Uwaine mentioned her failure to sign-wave
9 after being asked to do so to her. *See id.*

10 According to Ms. Yaindl, at the April 5th meeting, Mr. Nakanelua told employees
11 that they were being asked to sign-wave on Fridays, phone bank Monday through
12 Thursday evenings, canvass door-to-door Saturday mornings, and make financial
13 contributions. *See id.* at ¶ 16. Mr. Nakanelua also reportedly stated that "any staff who
14 may need to request an exemption from any of these activities should 'come see [him].'"
15 *Id.* at ¶ 17 (paraphrasing Nakanelua). Mr. Uwaine then reportedly stated something like,
16 Nakanelua is "too kind" or "being too easy." *Id.* at ¶ 18. Uwaine then reportedly said,
17 "It is expected that all staff will sign wave on Fridays [afternoons], phone bank Monday
18 through Thursdays [evenings], and canvass on Saturdays [mornings]." *Id.* at ¶ 18. Ms.
19 Yaindl also claims that Mr. Uwaine directed employees, "who may have a part time job
20 on Saturdays, or who may be involved in other activities like coaching, you are to inform
21 your employer or team that you are not going to be available to them for the next six (6)
22 weeks." *Id.* at ¶ 21.

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1 At the meeting, Ms. Yaindl openly expressed concerns about the union's policy
2 on requiring employees to forego work or other responsibilities to do volunteer political
3 work. *See id.* at ¶ 23. After the meeting, she documented those concerns in a
4 memorandum, and advised UPW that while she was available "and actually eager" to
5 phone bank for Hanabusa, she refused to sign-wave because of public safety concerns to
6 drivers and was unavailable on Saturdays to participate in door-to-door canvassing
7 because she worked at a farmer's market. *See* UPW Response Ex. 14. According to the
8 complaint, Mr. Lau was not at the April 5th meeting, but upon his return to the office, he
9 also informed Mr. Nakanelua that he was unavailable to canvass on Saturdays. *See*
10 Complaint at ¶ 34.

11 UPW does not dispute Ms. Yaindl's description of the April 5th meeting regarding
12 its planned activities in support of Hanabusa's candidacy. UPW, however, maintains that
13 its campaign activities for employees were voluntary. *See* UPW Responses at 12. UPW
14 also asserts that *Citizens United* permits the union to make independent expenditures,
15 such as instructing staff to engage in campaign activities. *See id.* at 12-13.

16 **C. The Terminations**

17 UPW fired Ms. Yaindl and Mr. Lau on April 16, 2010. *See* Complaint at ¶¶ 30,
18 34 and Ex. 1; *see also* UPW Response at 4 n.2 and Exs. 9, 18. According to Ms. Yaindl,
19 Mr. Uwaine and Ms. Santiago gave her a termination letter signed by Mr. Nakanelua.
20 Complaint at ¶ 30. UPW offered to reinstate both employees on April 27, 2010, but
21 neither Ms. Yaindl nor Mr. Lau agreed to accept reinstatement. *See* UPW Response at
22 4 n.2 and Exs. 9, 10, 18. Neither the nearly identical termination letters nor the nearly
23 identical offers of reinstatement provide a reason for the terminations, although UPW's

1 termination letters note that both Ms. Yaindl and Mr. Lau were at-will employees. See
2 *id.* Exs. 9, 10; *see also* Complaint at ¶ 35.

3 The complaint alleges that both Ms. Yaindl and Mr. Lau were fired for refusing to
4 participate in the pro-Hanabusa campaign activities. In pursuing their unemployment
5 claims, both Ms. Yaindl and Mr. Lau cited their objections to political activity as the
6 reason for their dismissal, and UPW did not present any alternative reason (apparently
7 relying solely on its subsequent offer of reinstatement). See UPW Response Exs. 15-18.

8 UPW maintains that it did not threaten Ms. Yaindl and Mr. Lau for refusing to
9 contribute to, or participate in, political activities, and it did not fire them in retaliation for
10 expressing concern that the union was coercing employees to participate or contribute.
11 *Id.* at 5. The union also notes that other unnamed employees who did not participate in
12 its campaign activities “did not experience adverse employment action.” *Id.* at 6.
13 Finally, the union notes that it offered to reinstate Ms. Yaindl and Mr. Lau shortly after
14 their terminations, and “[a]ny unintended message that [Ms. Yaindl’s] termination was
15 imposed as a threat or in retaliation for not contributing to Hanabusa’s campaign quickly
16 evaporated with the offer to reinstate Ms. Yaindl (and Mr. Lau).” See *id.* at 10-11 (citing
17 Exs. 10, 18).

18 **II. LEGAL ANALYSIS**

19 **A. Coerced Financial Contributions**

20 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
21 corporations and labor organizations from making contributions in connection with any
22 federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). The term, “contribution,”
23 includes “any direct or indirect payment, distribution, loan, advance, deposit, gift of

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1 money, or any services, or anything of value” made to a candidate, campaign committee,
2 or political party organization. 2 U.S.C. § 441b(b)(2). The prohibition against corporate
3 and labor organization contributions under 2 U.S.C. § 441b(a) extends to the facilitation
4 of contributions to political committees, including the labor organization’s own separate
5 segregated fund (“SSF”). *See* 11 C.F.R. § 114.2(f)(1). Facilitation includes the use of
6 coercive activity, which involves “the threat of a detrimental job action, the threat of any
7 other financial reprisal, or the threat of force, to urge any individual to make a
8 contribution or engage in fundraising activities on behalf of a [federal] candidate or
9 political committee.” 11 C.F.R. § 114.2(f)(2)(iv). *See also* 2 U.S.C. § 441b(b)(3)
10 (prohibiting SSFs from making a contribution or expenditure “by utilizing money or
11 anything of value secured by physical force, job discrimination, financial reprisals, or the
12 threat of force, job discrimination, or financial reprisal . . .”).

13 The complaint generally alleges UPW coerced employees to make financial
14 contributions to Hanabusa 2010. However, the Committee’s disclosure reports do not
15 indicate any receipt of contributions from UPW employees. It is possible that the
16 contributions may be unitemized because they fall below the amount that requires the
17 Committee to report the contribution. *See* 2 U.S.C. § 434(b)(3)(A). However, the
18 complaint also fails to allege any specific information regarding any purported
19 monitoring of employee response to the solicitation of financial contributions. By
20 contrast, in MUR 5268 (Kentucky State District Council of Carpenters, *et al.*), the
21 Commission made reason to believe findings based on information that the union was
22 monitoring or tracking which employees complied with its requests to make contributions
23 to specified federal candidates. *See* MUR 5268 Factual and Legal Analyses.

1 Here, the available information fails to allege a similar systematic effort to
2 monitor or track whether employees actually made the requested financial contributions.
3 Accordingly, the Commission finds no reason to believe UPW violated 2 U.S.C.
4 § 441b(a) and 11 C.F.R. § 114.2(f) by coercing UPW employees to make financial
5 contributions to Hanabusa 2010.

6 **B. Coordination**

7 The Act prohibits corporations and labor organizations from making contributions
8 in connection with any federal election, including in-kind contributions. 2 U.S.C.
9 § 441b(a), (b)(2); 11 C.F.R. § 100.7(a)(1)(iii)(B). The Act provides that expenditures,
10 electioneering communications, or republished campaign materials made in coordination
11 with a committee constitute in-kind contributions to that candidate or party committee.
12 See 2 U.S.C. § 441a(a)(7).

13 The Commission's regulations provide a three-prong test to determine whether a
14 communication is coordinated.¹ All three prongs of the test must be satisfied to support a
15 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
16 Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed.
17 Reg. 33190 (June 8, 2006) and Explanation and Justification for Regulations on
18 Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Under
19 11 C.F.R. § 109.20(b), a coordinated expenditure that is not made for a communication is
20 either an in-kind contribution or coordinated party expenditure that must be reported as

¹ Recently revised regulations on coordinated communications include a new content standard at 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy and a new safe harbor for certain business and commercial communications. *See Coordinated Communications*, 75 Fed. Reg. 55947 (Sept. 15, 2010).

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1 an expenditure. The campaign activities in this matter, however, appear to involve
2 communicative activities that would not invoke the application of part 109.20(b).

3 The available facts indicate that while the communication meets the payment and
4 content prongs via UPW's expenditures for pro-Hanabusa campaign activities, it did not
5 meet the conduct prong. The Hanabusa Committee explicitly denies any knowledge or
6 involvement with UPW's campaign activities. See Hanabusa 2010 Response at 1; see
7 also *id.* (Hamakawa Aff. at ¶ 6) (stating "To my knowledge, the Hanabusa 2010
8 campaign had no involvement with, or knowledge of, the alleged acts and
9 communications by [Respondents] as described in the Complaint."). While UPW's
10 Response does not comment on its interaction with Hanabusa 2010, it claims to have
11 engaged in the type of independent expenditures authorized by *Citizens United*.

12 In the absence of information suggesting the union satisfied the conduct prong of
13 the coordination regulations, the union's campaign activities do not appear to result in
14 prohibited in-kind contributions to Hanabusa 2010. Accordingly, the Commission finds
15 no reason to believe that UPW made prohibited corporate in-kind contributions in
16 violation of 2 U.S.C. § 441b(a).

17 **C. Failure to File Independent Expenditure Reports**

18 Under the Act, a person that makes independent expenditures aggregating
19 \$10,000 or more at any time up to and including the twentieth day before the date of an
20 election must file a report describing the expenditures within 48 hours. 2 U.S.C.
21 § 434(g)(2). The Act further requires that a person that makes independent expenditures
22 aggregating \$1,000 or more after the twentieth day, but more than twenty-four hours
23 before the date of an election must file a report describing the expenditures within

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1 twenty-four hours. *Id.* § 434(g)(1).

2 Although UPW acknowledges making expenditures to support Hanabusa 2010, as
3 permitted following *Citizens United*, the union did not report any independent
4 expenditures with the Commission.² UPW would have been required to disclose the
5 campaign activities as independent expenditures within 48 hours if it spent more than
6 \$10,000 for employees to sign-wave, phone bank, and canvass after work hours and on
7 weekends prior to May 1, 2010. Similarly, UPW would have been required to disclose
8 the campaign activities as independent expenditures within 24 hours if it spent more than
9 \$1,000 for employees to engage in the same type of campaign activities between May 1,
10 2010 and the special election on May 22, 2010. Here, UPW's activities appear to date
11 from late March 2010 through the special election on May 22, 2010.

12 It appears that approximately 39 UPW employees were collectively required to
13 spend hundreds of hours on campaign activities, so it is likely that UPW spent over
14 \$10,000, including salaries, in connection with sign-waving, phone banking, and door-to-
15 door canvassing in support of Hanabusa up to May 1, 2010, and also spent over \$1,000
16 for costs (including salaries) for the same campaign activities in support of Hanabusa
17 between May 1, 2010 and the special election on May 22, 2010. Accordingly, the
18 Commission finds reason to believe that UPW violated 2 U.S.C. § 434(g) by failing to
19 report those costs as independent expenditures.

² While the response suggests the state PAC may have been behind the campaign activities, the state PAC also did not file any independent expenditure reports with the Commission. *See, e.g.*, UPW Response at 3 ("The State PACs play an important role in planning, organizing, and coordinating a wide range of political actions. The State PACs are responsible for endorsing the candidates . . . and developing plans and programs to realize the union's political priorities."). However, UPW's disclosure reports with the Hawaii Campaign Spending Commission do not reflect any expenditures for Hanabusa 2010 by the state PAC in the time frame leading up to the special election.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Dayton Nakanelua, State Director **MUR:** 6344
United Public Workers, AFSCME
Local 646, AFL-CIO

I. FACTUAL BACKGROUND

A. Introduction

This matter concerns Georgette Yaindl's allegations that Respondent United Public Workers, AFSCME Local 646, AFL-CIO and union managers Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago ("UPW" or "the union") coerced union employees to support Hawaii First Congressional District candidate Colleen Hanabusa's candidacy in a special congressional election on May 22, 2010, and then fired Ms. Yaindl and another UPW employee, Terry Lau, when they refused to comply. Respondents deny that they coerced employees to participate in union-sponsored pro-Hanabusa campaign activities, but alternatively argue that after *Citizens United v. FEC*, 130 S. Ct. 876 (2010), they could have legally compelled its employees to do so.

UPW is the exclusive bargaining representative for approximately 11,800 public sector employees in Hawaii. *See* UPW Response at 3. UPW's staff consists of approximately 39 employees. *See id.* at 4. Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago are all union managers. The union operates a registered state PAC, but does not have a federal PAC. *Id.* at 3 (citing Ex. 5). UPW acknowledges it is a "political entity" that endorses candidates and "plan[s], organiz[es], and coordinat[es] a wide range of political actions," including "sign-waving, coffee hours, friend-to-friend

1 cards, phone banking, mail-outs, house-to-house canvassing, [and] rallies” to support
2 those candidates. *Id.*

3 Hanabusa 2010 is the principal campaign committee of Colleen Hanabusa, then a
4 member of the Hawaii Senate and a candidate in the May 2010 special election in
5 Hawaii’s First Congressional District. *See* Amended Statement of Organization, dated
6 Oct. 28, 2009. The Committee’s disclosure reports do not reflect receipt of any financial
7 or in-kind contributions from UPW, UPW’s State PAC, or any UPW employees.
8 Further, neither UPW nor its State PAC filed any independent expenditure or
9 electioneering communications reports as to activities in support of Hanabusa.

10 Georgette Yaindl, Esq., is a licensed attorney in Hawaii. Complaint at ¶ 1. She
11 worked as a staff attorney for UPW from August 27, 2007, until April 16, 2010, when
12 UPW terminated her. *Id.* at ¶¶ 4, 30 and Ex. 1; UPW Response at 4 and Ex. 9.

13 Terry Lau was a lobbyist for UPW. Complaint at ¶ 34; UPW Response at 4 n.2.
14 He worked for UPW until April 16, 2010, when UPW terminated him. UPW Response
15 at 4 n.2 and Ex. 18.

16 **B. UPW’s Campaign Activities**

17 In mid-to-late March 2010, UPW e-mailed its employees a notice that the union
18 would sign-wave to support Hanabusa every Friday at 4:30 p.m. *See* Complaint at ¶ 8.
19 Then, UPW required all employees to attend a staff meeting on April 5, 2010, at which
20 the union asked employees to support Hanabusa 2010 by sign-waving, phone banking,
21 canvassing, and making financial contributions to the Committee. *See id.* at ¶¶ 12, 16.
22 The union notified employees by e-mail about the mandatory meeting “[s]ometime
23 within ten (10) or so days prior to April 5, 2010,” and required employees to formally

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1 request and obtain approval from Mr. Nakanelua if they were unable to attend. *See id.* at
2 ¶ 12. Except for three or four employees, including Mr. Lau, the entire staff was in
3 attendance, including executive staff, business agents, receptionists, clerks, and UPW's
4 custodian. *See id.* at ¶ 14. The union's campaign to support Hanabusa was similar to
5 previous instances when the union had asked employees to participate in political
6 campaign activities for state and local candidates. *See id.* at ¶ 6. Ms. Yaindl states that
7 she did not participate in any of these prior campaign-related activities for state and local
8 candidates, and UPW Executive Assistant Uwaine mentioned her failure to sign-wave
9 after being asked to do so to her. *See id.*

10 According to Ms. Yaindl, at the April 5th meeting, Mr. Nakanelua told employees
11 that they were being asked to sign-wave on Fridays, phone bank Monday through
12 Thursday evenings, canvass door-to-door Saturday mornings, and make financial
13 contributions. *See id.* at ¶ 16. Mr. Nakanelua also reportedly stated that "any staff who
14 may need to request an exemption from any of these activities should 'come see [him].'"
15 *Id.* at ¶ 17 (paraphrasing Nakanelua). Mr. Uwaine then reportedly stated something like,
16 Nakanelua is "'too kind'" or 'being too easy.'" *Id.* at ¶ 18. Uwaine then reportedly said,
17 "It is expected that all staff will sign wave on Fridays [afternoons], phone bank Monday
18 through Thursdays [evenings], and canvass on Saturdays [mornings]." *Id.* at ¶ 18. Ms.
19 Yaindl also claims that Mr. Uwaine directed employees, "who may have a part time job
20 on Saturdays, or who may be involved in other activities like coaching, you are to inform
21 your employer or team that you are not going to be available to them for the next six (6)
22 weeks." *Id.* at ¶ 21.

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1 At the meeting, Ms. Yaindl openly expressed concerns about the union's policy
2 on requiring employees to forego work or other responsibilities to do volunteer political
3 work. *See id.* at ¶ 23. After the meeting, she documented those concerns in a
4 memorandum, and advised UPW that while she was available "and actually eager" to
5 phone bank for Hanabusa, she refused to sign-wave because of public safety concerns to
6 drivers and was unavailable on Saturdays to participate in door-to-door canvassing
7 because she worked at a farmer's market. *See* UPW Response Ex. 14. According to the
8 complaint, Mr. Lau was not at the April 5th meeting, but upon his return to the office, he
9 also informed Mr. Nakanelua that he was unavailable to canvass on Saturdays. *See*
10 Complaint at ¶ 34.

11 UPW does not dispute Ms. Yaindl's description of the April 5th meeting regarding
12 its planned activities in support of Hanabusa's candidacy. UPW, however, maintains that
13 its campaign activities for employees were voluntary. *See* UPW Responses at 12. UPW
14 also asserts that *Citizens United* permits the union to make independent expenditures,
15 such as instructing staff to engage in campaign activities. *See id.* at 12-13.

16 **C. The Terminations**

17 UPW fired Ms. Yaindl and Mr. Lau on April 16, 2010. *See* Complaint at ¶¶ 30,
18 34 and Ex. 1; *see also* UPW Response at 4 n.2 and Exs. 9, 18. According to Ms. Yaindl,
19 Mr. Uwaine and Ms. Santiago gave her a termination letter signed by Mr. Nakanelua.
20 Complaint at ¶ 30. UPW offered to reinstate both employees on April 27, 2010, but
21 neither Ms. Yaindl nor Mr. Lau agreed to accept reinstatement. *See* UPW Response at
22 4 n.2 and Exs. 9, 10, 18. Neither the nearly identical termination letters nor the nearly
23 identical offers of reinstatement provide a reason for the terminations, although UPW's

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1 termination letters note that both Ms. Yaindl and Mr. Lau were at-will employees. *See*
2 *id.* Exs. 9, 10; *see also* Complaint at ¶ 35.

3 The complaint alleges that both Ms. Yaindl and Mr. Lau were fired for refusing to
4 participate in the pro-Hanabusa campaign activities. In pursuing their unemployment
5 claims, both Ms. Yaindl and Mr. Lau cited their objections to political activity as the
6 reason for their dismissals, and UPW did not present any alternative reason (apparently
7 relying solely on its subsequent offers of reinstatement). *See* UPW Response Exs. 15-18.

8 UPW maintains that it did not threaten Ms. Yaindl and Mr. Lau for refusing to
9 contribute to, or participate in, political activities, and it did not fire them in retaliation for
10 expressing concern that the union was coercing employees to participate or contribute.
11 *Id.* at 5. The union also notes that other unnamed employees who did not participate in
12 its campaign activities “did not experience adverse employment action.” *Id.* at 6.
13 Finally, the union notes that it offered to reinstate Ms. Yaindl and Mr. Lau shortly after
14 their terminations, and “[a]ny unintended message that [Ms. Yaindl’s] termination was
15 imposed as a threat or in retaliation for not contributing to Hanabusa’s campaign quickly
16 evaporated with the offer to reinstate Ms. Yaindl (and Mr. Lau).” *See id.* at 10-11 (citing
17 Exs. 10, 18).

18 II. LEGAL ANALYSIS

19 A. Coerced Financial Contributions

20 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
21 corporations and labor organizations from making contributions in connection with any
22 federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). The term, “contribution,”
23 includes “any direct or indirect payment, distribution, loan, advance, deposit, gift of

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1 money, or any services, or anything of value” made to a candidate, campaign committee,
2 or political party organization. 2 U.S.C. § 441b(b)(2). The prohibition against corporate
3 and labor organization contributions under 2 U.S.C. § 441b(a) extends to the facilitation
4 of contributions to political committees, including the labor organization’s own separate
5 segregated fund (“SSF”). *See* 11 C.F.R. § 114.2(f)(1). Facilitation includes the use of
6 coercive activity, which involves “the threat of a detrimental job action, the threat of any
7 other financial reprisal, or the threat of force, to urge any individual to make a
8 contribution or engage in fundraising activities on behalf of a [federal] candidate or
9 political committee.” 11 C.F.R. § 114.2(f)(2)(iv). *See also* 2 U.S.C. § 441b(b)(3)
10 (prohibiting SSFs from making a contribution or expenditure “by utilizing money or
11 anything of value secured by physical force, job discrimination, financial reprisals, or the
12 threat of force, job discrimination, or financial reprisal . . .”).

13 The complaint alleges UPW coerced employees to make financial contributions to
14 Hanabusa 2010. However, the Committee’s disclosure reports do not indicate any receipt
15 of contributions from UPW employees. It is possible that the contributions may be
16 unitemized because they fall below the amount that requires the Committee to report the
17 contribution. *See* 2 U.S.C. § 434(b)(3)(A). However, the complaint also fails to allege
18 any specific information regarding any purported monitoring of employee response to the
19 solicitation of financial contributions. By contrast, in MUR 5268 (Kentucky State
20 District Council of Carpenters, *et al.*), the Commission made reason to believe findings
21 based on information that the union was monitoring or tracking which employees
22 complied with its requests to make contributions to specified federal candidates. *See*
23 MUR 5268 Factual and Legal Analyses.

1 Here, the available information fails to allege a similar systematic effort to
2 monitor or track whether employees actually made the requested financial contributions.
3 Accordingly, the Commission finds no reason to believe Dayton Nakanelua violated
4 2 U.S.C. § 441b(a) by coercing UPW employees to make financial contributions to
5 Hanabusa 2010.

6 **B. Coordination**

7 The Act prohibits corporations and labor organizations from making contributions
8 in connection with any federal election, including in-kind contributions. 2 U.S.C.
9 § 441b(a), (b)(2); 11 C.F.R. § 100.7(a)(1)(iii)(B). The Act provides that expenditures,
10 electioneering communications, or republished campaign materials made in coordination
11 with a committee constitute in-kind contributions to that candidate or party committee.
12 See 2 U.S.C. § 441a(a)(7).

13 The Commission's regulations provide a three-prong test to determine whether a
14 communication is coordinated.¹ All three prongs of the test must be satisfied to support a
15 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
16 *Explanation and Justification for Final Rules on Coordinated Communications*, 71 Fed.
17 *Reg.* 33190 (June 8, 2006) and *Explanation and Justification for Regulations on*
18 *Coordinated and Independent Expenditures*, 68 Fed. *Reg.* 421 (Jan. 3, 2003). Under
19 11 C.F.R. § 109.20(b), a coordinated expenditure that is not made for a communication is
20 either an in-kind contribution or coordinated party expenditure that must be reported as

¹ Recently revised regulations on coordinated communications include a new content standard at 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy and a new safe harbor for certain business and commercial communications. *See Coordinated Communications*, 75 Fed. *Reg.* 55947 (Sept. 15, 2010).

1 an expenditure. The campaign activities in this matter, however, appear to involve
2 communicative activities that would not invoke the application of part 109.20(b).

3 The available facts indicate that while the communication meets the payment and
4 content prongs via UPW's expenditures for pro-Hanabusa campaign activities, it did not
5 meet the conduct prong. The Hanabusa Committee explicitly denies any knowledge or
6 involvement with UPW's campaign activities. See Hanabusa 2010 Response at 1; see
7 also *id.* (Hamakawa Aff. at ¶ 6) (stating "To my knowledge, the Hanabusa 2010
8 campaign had no involvement with, or knowledge of, the alleged acts and
9 communications by [Respondents] as described in the Complaint."). While UPW's
10 Response does not comment on its interaction with Hanabusa 2010, it claims to have
11 engaged in the type of independent expenditures authorized by *Citizens United*.

12 In the absence of information suggesting the union satisfied the conduct prong of
13 the coordination regulations, the union's campaign activities do not appear to result in
14 prohibited in-kind contributions to Hanabusa 2010. Accordingly, the Commission finds
15 no reason to believe that Dayton Nakanelua violated 2 U.S.C. § 441b(a) by consenting to
16 the making of prohibited contributions.

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Clifford "Chip" Uwaine, Executive **MUR: 6344**
Assistant to the State Director,
United Public Workers, AFSCME
Local 646, AFL-CIO

I. FACTUAL BACKGROUND

A. Introduction

This matter concerns Georgette Yaindl's allegations that Respondent United Public Workers, AFSCME Local 646, AFL-CIO and union managers Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago ("UPW" or "the union") coerced union employees to support Hawaii First Congressional District candidate Colleen Hanabusa's candidacy in a special congressional election on May 22, 2010, and then fired Ms. Yaindl and another UPW employee, Terry Lau, when they refused to comply. Respondents deny that they coerced employees to participate in union-sponsored pro-Hanabusa campaign activities, but alternatively argue that after *Citizens United v. FEC*, 130 S. Ct. 876 (2010), they could have legally compelled its employees to do so.

UPW is the exclusive bargaining representative for approximately 11,800 public sector employees in Hawaii. See UPW Response at 3. UPW's staff consists of approximately 39 employees. See *id.* at 4. Clifford "Chip" Uwaine, Dayton Nakanelua, and Laurie Santiago are all union managers. The union operates a registered state PAC, but does not have a federal PAC. *Id.* at 3 (citing Ex. 5). UPW acknowledges it is a "political entity" that endorses candidates and "plan[s], organiz[es], and coordinat[es] a wide range of political actions," including "sign-waving, coffee hours, friend-to-friend

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1 cards, phone banking, mail-outs, house-to-house canvassing, [and] rallies" to support
2 those candidates. *Id.*

3 Hanabusa 2010 is the principal campaign committee of Colleen Hanabusa, then a
4 member of the Hawaii Senate and a candidate in the May 2010 special election in
5 Hawaii's First Congressional District. *See* Amended Statement of Organization, dated
6 Oct. 28, 2009. The Committee's disclosure reports do not reflect receipt of any financial
7 or in-kind contributions from UPW, UPW's State PAC, or any UPW employees.
8 Further, neither UPW nor its state PAC filed any independent expenditure or
9 electioneering communications reports as to activities in support of Hanabusa.

10 Georgette Yaindl, Esq., is a licensed attorney in Hawaii. Complaint at ¶ 1. She
11 worked as a staff attorney for UPW from August 27, 2007, until April 16, 2010, when
12 UPW terminated her. *Id.* at ¶¶ 4, 30 and Ex. 1; UPW Response at 4 and Ex. 9.

13 Terry Lau was a lobbyist for UPW. Complaint at ¶ 34; UPW Response at 4 n.2.
14 He worked for UPW until April 16, 2010, when UPW terminated him. UPW Response
15 at 4 n.2 and Ex. 18.

16 **B. UPW's Campaign Activities**

17 In mid-to-late March 2010, UPW e-mailed its employees a notice that the union
18 would sign-wave to support Hanabusa every Friday at 4:30 p.m. *See* Complaint at ¶ 8.
19 Then, UPW required all employees to attend a staff meeting on April 5, 2010, at which
20 the union asked employees to support Hanabusa 2010 by sign-waving, phone banking,
21 canvassing, and making financial contributions to the Committee. *See id.* at ¶¶ 12, 16.
22 The union notified employees by e-mail about the mandatory meeting "[s]ometime
23 within ten (10) or so days prior to April 5, 2010," and required employees to formally

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1 request and obtain approval from Mr. Nakanelua if they were unable to attend. *See id.* at
2 ¶ 12. Except for three or four employees, including Mr. Lau, the entire staff was in
3 attendance, including executive staff, business agents, receptionists, clerks, and UPW's
4 custodian. *See id.* at ¶ 14. The union's campaign to support Hanabusa was similar to
5 previous instances when the union had asked employees to participate in political
6 campaign activities for state and local candidates. *See id.* at ¶ 6. Ms. Yaindl states that
7 she did not participate in any of these prior campaign-related activities for state and local
8 candidates, and UPW Executive Assistant Uwaine mentioned her failure to sign-wave
9 after being asked to do so to her. *See id.*

10 According to Ms. Yaindl, at the April 5th meeting, Mr. Nakanelua told employees
11 that they were being asked to sign-wave on Fridays, phone bank Monday through
12 Thursday evenings, canvass door-to-door Saturday mornings, and make financial
13 contributions. *See id.* at ¶ 16. Mr. Nakanelua also reportedly stated that "any staff who
14 may need to request an exemption from any of these activities should 'come see [him].'"
15 *Id.* at ¶ 17 (paraphrasing Nakanelua). Mr. Uwaine then reportedly stated something like,
16 Nakanelua is "'too kind'" or 'being too easy.'" *Id.* at ¶ 18. Uwaine then reportedly said,
17 "It is expected that all staff will sign wave on Fridays [afternoons], phone bank Monday
18 through Thursdays [evenings], and canvass on Saturdays [mornings]." *Id.* at ¶ 18. Ms.
19 Yaindl also claims that Mr. Uwaine directed employees, "who may have a part time job
20 on Saturdays, or who may be involved in other activities like coaching, you are to inform
21 your employer or team that you are not going to be available to them for the next six (6)
22 weeks." *Id.* at ¶ 21.

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1 At the meeting, Ms. Yaindl openly expressed concerns about the union's policy
2 on requiring employees to forego work or other responsibilities to do volunteer political
3 work. *See id.* at ¶ 23. After the meeting, she documented those concerns in a
4 memorandum, and advised UPW that while she was available "and actually eager" to
5 phone bank for Hanabusa, she refused to sign-wave because of public safety concerns to
6 drivers and was unavailable on Saturdays to participate in door-to-door canvassing
7 because she worked at a farmer's market. *See* UPW Response Ex. 14. According to the
8 complaint, Mr. Lau was not at the April 5th meeting, but upon his return to the office, he
9 also informed Mr. Nakanelua that he was unavailable to canvass on Saturdays. *See*
10 Complaint at ¶ 34.

11 UPW does not dispute Ms. Yaindl's description of the April 5th meeting regarding
12 its planned activities in support of Hanabusa's candidacy. UPW, however, maintains that
13 its campaign activities for employees were voluntary. *See* UPW Responses at 12. UPW
14 also asserts that *Citizens United* permits the union to make independent expenditures,
15 such as instructing staff to engage in campaign activities. *See id.* at 12-13.

16 C. The Terminations

17 UPW fired Ms. Yaindl and Mr. Lau on April 16, 2010. *See* Complaint at ¶¶ 30,
18 34 and Ex. 1; *see also* UPW Response at 4 n.2 and Exs. 9, 18. According to Ms. Yaindl,
19 Mr. Uwaine and Ms. Santiago gave her a termination letter signed by Mr. Nakanelua.
20 Complaint at ¶ 30. UPW offered to reinstate both employees on April 27, 2010, but
21 neither Ms. Yaindl nor Mr. Lau agreed to accept reinstatement. *See* UPW Response at
22 4 n.2 and Exs. 9, 10, 18. Neither the nearly identical termination letters nor the nearly
23 identical offers of reinstatement provide a reason for the terminations, although UPW's

1 termination letters note that both Ms. Yaindl and Mr. Lau were at-will employees. See
2 *id.* Exs. 9, 10; see also Complaint at ¶ 35.

3 The complaint alleges that both Ms. Yaindl and Mr. Lau were fired for refusing to
4 participate in the pro-Hanabusa campaign activities. In pursuing their unemployment
5 claims, both Ms. Yaindl and Mr. Lau cited their objections to political activity as the
6 reason for their dismissals, and UPW did not present any alternative reason (apparently
7 relying solely on its subsequent offers of reinstatement). See UPW Response Exs. 15-18.

8 UPW maintains that it did not threaten Ms. Yaindl and Mr. Lau for refusing to
9 contribute to, or participate in, political activities, and it did not fire them in retaliation for
10 expressing concern that the union was coercing employees to participate or contribute.
11 *Id.* at 5. The union also notes that other unnamed employees who did not participate in
12 its campaign activities “did not experience adverse employment action.” *Id.* at 6.
13 Finally, the union notes that it offered to reinstate Ms. Yaindl and Mr. Lau shortly after
14 their terminations, and “[a]ny unintended message that [Ms. Yaindl’s] termination was
15 imposed as a threat or in retaliation for not contributing to Hanabusa’s campaign quickly
16 evaporated with the offer to reinstate Ms. Yaindl (and Mr. Lau).” See *id.* at 10-11 (citing
17 Exs. 10, 18).

18 II. LEGAL ANALYSIS

19 A. Coerced Financial Contributions

20 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
21 corporations and labor organizations from making contributions in connection with any
22 federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). The term, “contribution,”
23 includes “any direct or indirect payment, distribution, loan, advance, deposit, gift of

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1 money, or any services, or anything of value" made to a candidate, campaign committee,
2 or political party organization. 2 U.S.C. § 441b(b)(2). The prohibition against corporate
3 and labor organization contributions under 2 U.S.C. § 441b(a) extends to the facilitation
4 of contributions to political committees, including the labor organization's own separate
5 segregated fund ("SSF"). See 11 C.F.R. § 114.2(f)(1). Facilitation includes the use of
6 coercive activity, which involves "the threat of a detrimental job action, the threat of any
7 other financial reprisal, or the threat of force, to urge any individual to make a
8 contribution or engage in fundraising activities on behalf of a [federal] candidate or
9 political committee." 11 C.F.R. § 114.2(f)(2)(iv). See also 2 U.S.C. § 441b(b)(3)
10 (prohibiting SSFs from making a contribution or expenditure "by utilizing money or
11 anything of value secured by physical force, job discrimination, financial reprisals, or the
12 threat of force, job discrimination, or financial reprisal . . .").

13 The complaint generally alleges UPW coerced employees to make financial
14 contributions to Hanabusa 2010. However, the Committee's disclosure reports do not
15 indicate any receipt of contributions from UPW employees. It is possible that the
16 contributions may be unitemized because they fall below the amount that requires the
17 Committee to report the contribution. See 2 U.S.C. § 434(b)(3)(A). However, the
18 complaint also fails to allege any specific information regarding any purported
19 monitoring of employee response to the solicitation of financial contributions. By
20 contrast, in MUR 5268 (Kentucky State District Council of Carpenters, *et al.*), the
21 Commission made reason to believe findings based on information that the union was
22 monitoring or tracking which employees complied with its requests to make contributions
23 to specified federal candidates. See MUR 5268 Factual and Legal Analyses.

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1 Here, the available information fails to allege a similar systematic effort to
2 monitor or track whether employees actually made the requested financial contributions.
3 Accordingly, the Commission finds no reason to believe Clifford “Chip” Uwaine violated
4 2 U.S.C. § 441b(a) by coercing UPW employees to make financial contributions to
5 Hanabusa 2010.

6 **B. Coordination**

7 The Act prohibits corporations and labor organizations from making contributions
8 in connection with any federal election, including in-kind contributions. 2 U.S.C.
9 § 441b(a), (b)(2); 11 C.F.R. § 100.7(a)(1)(iii)(B). The Act provides that expenditures,
10 electioneering communications, or republished campaign materials made in coordination
11 with a committee constitute in-kind contributions to that candidate or party committee.
12 See 2 U.S.C. § 441a(a)(7).

13 The Commission’s regulations provide a three-prong test to determine whether a
14 communication is coordinated.¹ All three prongs of the test must be satisfied to support a
15 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
16 Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed.
17 Reg. 33190 (June 8, 2006) and Explanation and Justification for Regulations on
18 Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Under
19 11 C.F.R. § 109.20(b), a coordinated expenditure that is not made for a communication is
20 either an in-kind contribution or coordinated party expenditure that must be reported as

¹ Recently revised regulations on coordinated communications include a new content standard at 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy and a new safe harbor for certain business and commercial communications. See Coordinated Communications, 75 Fed. Reg. 55947 (Sept. 15, 2010).

1 an expenditure. The campaign activities in this matter, however, appear to involve
2 communicative activities that would not invoke the application of part 109.20(b).

3 The available facts indicate that while the communication meets the payment and
4 content prongs via UPW's expenditures for pro-Hanabusa campaign activities, it did not
5 meet the conduct prong. The Hanabusa Committee explicitly denies any knowledge or
6 involvement with UPW's campaign activities. *See* Hanabusa 2010 Response at 1; *see*
7 *also id.* (Hamakawa Aff. at ¶ 6) (stating "To my knowledge, the Hanabusa 2010
8 campaign had no involvement with, or knowledge of, the alleged acts and
9 communications by [Respondents] as described in the Complaint."). While UPW's
10 Response does not comment on its interaction with Hanabusa 2010, it claims to have
11 engaged in the type of independent expenditures authorized by *Citizens United*.

12 In the absence of information suggesting the union satisfied the conduct prong of
13 the coordination regulations, the union's campaign activities do not appear to result in
14 prohibited in-kind contributions to Hanabusa 2010. Accordingly, the Commission finds
15 no reason to believe that Clifford "Chip" Uwaine violated 2 U.S.C. § 441b(a) by
16 consenting to the making of prohibited contributions.

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5
6 **RESPONDENT:** Laurie Santiago, Oahu Division Director MUR: 6344
7 United Public Workers, AFSCME
8 Local 646, AFL-CIO
9

10 **I. FACTUAL BACKGROUND**

11 **A. Introduction**

12 This matter concerns Georgette Yaindl's allegations that Respondent United
13 Public Workers, AFSCME Local 646, AFL-CIO and union managers Clifford "Chip"
14 Uwaine, Dayton Nakanelua, and Laurie Santiago ("UPW" or "the union") coerced union
15 employees to support Hawaii First Congressional District candidate Colleen Hanabusa's
16 candidacy in a special congressional election on May 22, 2010, and then fired Ms. Yaindl
17 and another UPW employee, Terry Lau, when they refused to comply. Respondents deny
18 that they coerced employees to participate in union-sponsored pro-Hanabusa campaign
19 activities, but alternatively argue that after *Citizens United v. FEC*, 130 S. Ct. 876 (2010),
20 they could have legally compelled its employees to do so.

21 UPW is the exclusive bargaining representative for approximately 11,800 public
22 sector employees in Hawaii. See UPW Response at 3. UPW's staff consists of
23 approximately 39 employees. See *id.* at 4. Clifford "Chip" Uwaine, Dayton Nakanelua,
24 and Laurie Santiago are all union managers. The union operates a registered state PAC,
25 but does not have a federal PAC. *Id.* at 3 (citing Ex. 5). UPW acknowledges it is a
26 "political entity" that endorses candidates and "plan[s], organiz[es], and coordinat[es] a
27 wide range of political actions," including "sign-waving, coffee hours, friend-to-friend

1 cards, phone banking, mail-outs, house-to-house canvassing, [and] rallies” to support
2 those candidates. *Id.*

3 Hanabusa 2010 is the principal campaign committee of Colleen Hanabusa, then a
4 member of the Hawaii Senate and a candidate in the May 2010 special election in
5 Hawaii’s First Congressional District. See Amended Statement of Organization, dated
6 Oct. 28, 2009. The Committee’s disclosure reports do not reflect receipt of any financial
7 or in-kind contributions from UPW, UPW’s State PAC, or any UPW employees.
8 Further, neither UPW nor its State PAC filed any independent expenditure or
9 electioneering communications reports as to activities in support of Hanabusa.

10 Georgette Yaindl, Esq., is a licensed attorney in Hawaii. Complaint at ¶ 1. She
11 worked as a staff attorney for UPW from August 27, 2007, until April 16, 2010, when
12 UPW terminated her. *Id.* at ¶¶ 4, 30 and Ex. 1; UPW Response at 4 and Ex. 9.

13 Terry Lau was a lobbyist for UPW. Complaint at ¶ 34; UPW Response at 4 n.2.
14 He worked for UPW until April 16, 2010, when UPW terminated him. UPW Response
15 at 4 n.2 and Ex. 18.

16 **B. UPW’s Campaign Activities**

17 In mid-to-late March 2010, UPW e-mailed its employees a notice that the union
18 would sign-wave to support Hanabusa every Friday at 4:30 p.m. See Complaint at ¶ 8.
19 Then, UPW required all employees to attend a staff meeting on April 5, 2010, at which
20 the union asked employees to support Hanabusa 2010 by sign-waving, phone banking,
21 canvassing, and making financial contributions to the Committee. See *id.* at ¶¶ 12, 16.
22 The union notified employees by e-mail about the mandatory meeting “[s]ometime
23 within ten (10) or so days prior to April 5, 2010,” and required employees to formally

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1 request and obtain approval from Mr. Nakanelua if they were unable to attend. *See id.* at
2 ¶ 12. Except for three or four employees, including Mr. Lau, the entire staff was in
3 attendance, including executive staff, business agents, receptionists, clerks, and UPW's
4 custodian. *See id.* at ¶ 14. The union's campaign to support Hanabusa was similar to
5 previous instances when the union had asked employees to participate in political
6 campaign activities for state and local candidates. *See id.* at ¶ 6. Ms. Yaindl states that
7 she did not participate in any of these prior campaign-related activities for state and local
8 candidates, and UPW Executive Assistant Uwaine mentioned her failure to sign-wave
9 after being asked to do so to her. *See id.*

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11 that they were being asked to sign-wave on Fridays, phone bank Monday through
12 Thursday evenings, canvass door-to-door Saturday mornings, and make financial
13 contributions. *See id.* at ¶ 16. Mr. Nakanelua also reportedly stated that "any staff who
14 may need to request an exemption from any of these activities should 'come see [him].'"
15 *Id.* at ¶ 17 (paraphrasing Nakanelua). Mr. Uwaine then reportedly stated something like,
16 Nakanelua is "'too kind'" or 'being too easy.'" *Id.* at ¶ 18. Uwaine then reportedly said,
17 "It is expected that all staff will sign wave on Fridays [afternoons], phone bank Monday
18 through Thursdays [evenings], and canvass on Saturdays [mornings]." *Id.* at ¶ 18. Ms.
19 Yaindl also claims that Mr. Uwaine directed employees, "who may have a part time job
20 on Saturdays, or who may be involved in other activities like coaching, you are to inform
21 your employer or team that you are not going to be available to them for the next six (6)
22 weeks." *Id.* at ¶ 21.

1 At the meeting, Ms. Yaindl openly expressed concerns about the union's policy
2 on requiring employees to forego work or other responsibilities to do volunteer political
3 work. *See id.* at ¶ 23. After the meeting, she documented those concerns in a
4 memorandum, and advised UPW that while she was available "and actually eager" to
5 phone bank for Hanabusa, she refused to sign-wave because of public safety concerns to
6 drivers and was unavailable on Saturdays to participate in door-to-door canvassing
7 because she worked at a farmer's market. *See* UPW Response Ex. 14. According to the
8 complaint, Mr. Lau was not at the April 5th meeting, but upon his return to the office, he
9 also informed Mr. Nakanelua that he was unavailable to canvass on Saturdays. *See*
10 Complaint at ¶ 34.

11 UPW does not dispute Ms. Yaindl's description of the April 5th meeting regarding
12 its planned activities in support of Hanabusa's candidacy. UPW, however, maintains that
13 its campaign activities for employees were voluntary. *See* UPW Responses at 12. UPW
14 also asserts that *Citizens United* permits the union to make independent expenditures,
15 such as instructing staff to engage in campaign activities. *See id.* at 12-13.

16 **C. The Terminations**

17 UPW fired Ms. Yaindl and Mr. Lau on April 16, 2010. *See* Complaint at ¶¶ 30,
18 34 and Ex. 1; *see also* UPW Response at 4 n.2 and Exs. 9, 18. According to Ms. Yaindl,
19 Mr. Uwaine and Ms. Santiago gave her a termination letter signed by Mr. Nakanelua.
20 Complaint at ¶ 30. UPW offered to reinstate both employees on April 27, 2010, but
21 neither Ms. Yaindl nor Mr. Lau agreed to accept reinstatement. *See* UPW Response at
22 4 n.2 and Exs. 9, 10, 18. Neither the nearly identical termination letters nor the nearly
23 identical offers of reinstatement provide a reason for the terminations, although UPW's

1 termination letters note that both Ms. Yaendl and Mr. Lau were at-will employees. See
2 *id.* Exs. 9, 10; see also Complaint at ¶ 35.

3 The complaint alleges that both Ms. Yaendl and Mr. Lau were fired for refusing to
4 participate in the pro-Hanabusa campaign activities. In pursuing their unemployment
5 claims, both Ms. Yaendl and Mr. Lau cited their objections to political activity as the
6 reason for their dismisals, and UPW did not present any alternative reason (apparently
7 relying solely on its subsequent offers of reinstatement). See UPW Response Exs. 15-18.

8 UPW maintains that it did not threaten Ms. Yaendl and Mr. Lau for refusing to
9 contribute to, or participate in, political activities, and it did not fire them in retaliation for
10 expressing concern that the union was coercing employees to participate or contribute.
11 *Id.* at 5. The union also notes that other unnamed employees who did not participate in
12 its campaign activities “did not experience adverse employment action.” *Id.* at 6.
13 Finally, the union notes that it offered to reinstate Ms. Yaendl and Mr. Lau shortly after
14 their terminations, and “[a]ny unintended message that [Ms. Yaendl’s] termination was
15 imposed as a threat or in retaliation for not contributing to Hanabusa’s campaign quickly
16 evaporated with the offer to reinstate Ms. Yaendl (and Mr. Lau).” See *id.* at 10-11 (citing
17 Exs. 10, 18).

18 II. LEGAL ANALYSIS

19 A. Coerced Financial Contributions

20 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
21 corporations and labor organizations from making contributions in connection with any
22 federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). The term, “contribution,”
23 includes “any direct or indirect payment, distribution, loan, advance, deposit, gift of

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1 money, or any services, or anything of value” made to a candidate, campaign committee,
2 or political party organization. 2 U.S.C. § 441b(b)(2). The prohibition against corporate
3 and labor organization contributions under 2 U.S.C. § 441b(a) extends to the facilitation
4 of contributions to political committees, including the labor organization’s own separate
5 segregated fund (“SSF”). *See* 11 C.F.R. § 114.2(f)(1). Facilitation includes the use of
6 coercive activity, which involves “the threat of a detrimental job action, the threat of any
7 other financial reprisal, or the threat of force, to urge any individual to make a
8 contribution or engage in fundraising activities on behalf of a [federal] candidate or
9 political committee.” 11 C.F.R. § 114.2(f)(2)(iv). *See also* 2 U.S.C. § 441b(b)(3)
10 (prohibiting SSFs from making a contribution or expenditure “by utilizing money or
11 anything of value secured by physical force, job discrimination, financial reprisals, or the
12 threat of force, job discrimination, or financial reprisal . . .”).

13 The complaint generally alleges UPW coerced employees to make financial
14 contributions to Hanabusa 2010. However, the Committee’s disclosure reports do not
15 indicate any receipt of contributions from UPW employees. It is possible that the
16 contributions may be unitemized because they fall below the amount that requires the
17 Committee to report the contribution. *See* 2 U.S.C. § 434(b)(3)(A). However, the
18 complaint also fails to allege any specific information regarding any purported
19 monitoring of employee response to the solicitation of financial contributions. By
20 contrast, in MUR 5268 (Kentucky State District Council of Carpenters, *et al.*), the
21 Commission made reason to believe findings based on information that the union was
22 monitoring or tracking which employees complied with its requests to make contributions
23 to specified federal candidates. *See* MUR 5268 Factual and Legal Analyses.

1 Here, the available information fails to allege a similar systematic effort to
2 monitor or track whether employees actually made the requested financial contributions.
3 Accordingly, the Commission finds no reason to believe Laurie Santiago violated
4 2 U.S.C. § 441b(a) by coercing UPW employees to make financial contributions to
5 Hanabusa 2010.

6 **B. Coordination**

7 The Act prohibits corporations and labor organizations from making contributions
8 in connection with any federal election, including in-kind contributions. 2 U.S.C.
9 § 441b(a), (b)(2); 11 C.F.R. § 100.7(a)(1)(iii)(B). The Act provides that expenditures,
10 electioneering communications, or republished campaign materials made in coordination
11 with a committee constitute in-kind contributions to that candidate or party committee.
12 See 2 U.S.C. § 441a(a)(7).

13 The Commission's regulations provide a three-prong test to determine whether a
14 communication is coordinated.¹ All three prongs of the test must be satisfied to support a
15 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
16 Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed.
17 Reg. 33190 (June 8, 2006) and Explanation and Justification for Regulations on
18 Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Under
19 11 C.F.R. § 109.20(b), a coordinated expenditure that is not made for a communication is
20 either an in-kind contribution or coordinated party expenditure that must be reported as

¹ Recently revised regulations on coordinated communications include a new content standard at 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy and a new safe harbor for certain business and commercial communications. *See* Coordinated Communications, 75 Fed. Reg. 55947 (Sept. 15, 2010).

1 an expenditure. The campaign activities in this matter, however, appear to involve
2 communicative activities that would not invoke the application of part 109.20(b).

3 The available facts indicate that while the communication meets the payment and
4 content prongs via UPW's expenditures for pro-Hanabusa campaign activities, it did not
5 meet the conduct prong. The Hanabusa Committee explicitly denies any knowledge or
6 involvement with UPW's campaign activities. See Hanabusa 2010 Response at 1; see
7 also *id.* (Hamakawa Aff. at ¶ 6) (stating "To my knowledge, the Hanabusa 2010
8 campaign had no involvement with, or knowledge of, the alleged acts and
9 communications by [Respondents] as described in the Complaint."). While UPW's
10 Response does not comment on its interaction with Hanabusa 2010, it claims to have
11 engaged in the type of independent expenditures authorized by *Citizens United*.

12 In the absence of information suggesting the union satisfied the conduct prong of
13 the coordination regulations, the union's campaign activities do not appear to result in
14 prohibited in-kind contributions to Hanabusa 2010. Accordingly, the Commission finds
15 no reason to believe that Laurie Santiago violated 2 U.S.C. § 441b(a) by consenting to the
16 making of prohibited contributions.

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5
6 **RESPONDENTS:** Hanabusa 2010, and Patsy Saiki MUR: 6344
7 in her official capacity
8 as Treasurer
9

10 **I. FACTUAL BACKGROUND**

11 **A. Introduction**

12 This matter concerns Georgette Yaindl's allegations that United Public Workers,
13 AFSCME Local 646, AFL-CIO and union managers Clifford "Chip" Uwayne, Dayton
14 Nakanelua, and Laurie Santiago ("UPW" or "the union") coerced union employees to
15 support Hawaii First Congressional District candidate Colleen Hanabusa's candidacy in a
16 special congressional election on May 22, 2010. The complaint also can be read as
17 suggesting that the UPW campaign activities were coordinated with and resulted in a
18 prohibited union in-kind contribution to Colleen Hanabusa's campaign committee.

19 UPW is the exclusive bargaining representative for approximately 11,800 public
20 sector employees in Hawaii. *See* UPW Response at 3. UPW's staff consists of
21 approximately 39 employees. *See id.* at 4. Clifford "Chip" Uwayne, Dayton Nakanelua,
22 and Laurie Santiago are all union managers. The union operates a registered state PAC,
23 but does not have a federal PAC. *Id.* at 3 (citing Ex. 5). UPW acknowledges it is a
24 "political entity" that endorses candidates and "plan[s], organiz[es], and coordinat[es] a
25 wide range of political actions," including "sign-waving, coffee hours, friend-to-friend
26 cards, phone banking, mail-outs, house-to-house canvassing, [and] rallies" to support
27 those candidates. *Id.*

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1 Hanabusa 2010 is the principal campaign committee of Colleen Hanabusa, then a
2 member of the Hawaii Senate and a candidate in the May 2010 special election in
3 Hawaii's First Congressional District. See Amended Statement of Organization, dated
4 Oct. 28, 2009. The Committee's disclosure reports do not reflect receipt of any financial
5 or in-kind contributions from UPW, UPW's State PAC, or any UPW employees.
6 Further, neither UPW nor its state PAC filed any independent expenditure or
7 electioneering communications reports as to activities in support of Hanabusa.

8 **B. UPW's Campaign Activities**

9 In mid-to-late March 2010, UPW e-mailed its employees a notice that the union
10 would sign-wave to support Hanabusa every Friday at 4:30 p.m. See Complaint at ¶ 8.
11 Then, UPW required all employees to attend a staff meeting on April 5, 2010, at which
12 the union asked employees to support Hanabusa 2010 by sign-waving, phone banking,
13 canvassing, and making financial contributions to the Committee. See *id.* at ¶¶ 12, 16.
14 The union notified employees by e-mail about the mandatory meeting "[s]ometime
15 within ten (10) or so days prior to April 5, 2010," and required employees to formally
16 request and obtain approval from Mr. Nakanelua if they were unable to attend. See *id.* at
17 ¶ 12. Except for three or four employees, the entire staff was in attendance, including
18 executive staff, business agents, receptionists, clerks, and UPW's custodian. See *id.* at
19 ¶ 14. The union's campaign to support Hanabusa was similar to previous instances when
20 the union had asked employees to participate in political campaign activities for state and
21 local candidates. See *id.* at ¶ 6. Ms. Yaindl states that she did not participate in any of
22 these prior campaign-related activities for state and local candidates, and UPW Executive

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1 Assistant Uwaine mentioned her failure to sign-wave after being asked to do so to her.

2 *See id.*

3 According to Ms. Yaindl, at the April 5th meeting, Mr. Nakanelua told employees
4 that they were being asked to sign-wave on Fridays, phone-bank Monday through
5 Thursday evenings, canvass door-to-door Saturday mornings, and make financial
6 contributions. *See id.* at ¶ 16. Mr. Nakanelua also reportedly stated that “any staff who
7 may need to request an exemption from any of these activities should ‘come see [him].’”
8 *Id.* at ¶ 17 (paraphrasing Nakanelua). Mr. Uwaine then reportedly stated something like,
9 Nakanelua is “‘too kind’” or ‘being too easy.’” *Id.* at ¶ 18. Uwaine then reportedly said,
10 “It is expected that all staff will sign wave on Fridays [afternoons], phone bank Monday
11 through Thursdays [evenings], and canvass on Saturdays [mornings].” *Id.* at ¶ 18. Ms.
12 Yaindl also claims that Mr. Uwaine directed employees, “who may have a part time job
13 on Saturdays, or who may be involved in other activities like coaching, you are to inform
14 your employer or team that you are not going to be available to them for the next six (6)
15 weeks.” *Id.* at ¶ 21.

16 UPW does not dispute Ms. Yaindl’s description of the April 5th meeting regarding
17 its planned activities in support of Hanabusa’s candidacy. UPW, however, maintains that
18 its campaign activities for employees were voluntary. *See* UPW Responses at 12. UPW
19 also asserts that *Citizens United* permits the union to make independent expenditures,
20 such as instructing staff to engage in campaign activities. *See id.* at 12-13.

21 II. LEGAL ANALYSIS

22 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
23 corporations and labor organizations from making contributions in connection with any

1 federal election, including in-kind contributions. 2 U.S.C. § 441b(a), (b)(2); 11 C.F.R.
2 § 100.7(a)(1)(iii)(B). The Act provides that expenditures, electioneering
3 communications, or republished campaign materials made in coordination with a
4 committee constitute in-kind contributions to that candidate or party committee. *See*
5 2 U.S.C. § 441a(a)(7).

6 The Commission's regulations provide a three-prong test to determine whether a
7 communication is coordinated.¹ All three prongs of the test must be satisfied to support a
8 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*
9 Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed.
10 Reg. 33190 (June 8, 2006) and Explanation and Justification for Regulations on
11 Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Under
12 11 C.F.R. § 109.20(b), a coordinated expenditure that is not made for a communication is
13 either an in-kind contribution or coordinated party expenditure that must be reported as
14 an expenditure. The campaign activities in this matter, however, appear to involve
15 communicative activities that would not invoke the application of part 109.20(b).

16 The available facts indicate that while the communication meets the payment and
17 content prongs via UPW's expenditures for pro-Hanabusa campaign activities, it did not
18 meet the conduct prong. The Hanabusa Committee explicitly denies any knowledge or
19 involvement with UPW's campaign activities. *See* Hanabusa 2010 Response at 1; *see*
20 *also id.* (Hamakawa Aff. at ¶ 6) (stating "To my knowledge, the Hanabusa 2010
21 campaign had no involvement with, or knowledge of, the alleged acts and

¹ Recently revised regulations on coordinated communications include a new content standard at 11 C.F.R. § 109.21(c)(5) for communications that are the functional equivalent of express advocacy and a new safe harbor for certain business and commercial communications. *See* Coordinated Communications, 75 Fed. Reg. 55947 (Sept. 15, 2010).

1 communications by [Respondents] as described in the Complaint.”). While UPW’s
2 Response does not comment on its interaction with Hanabusa 2010, it claims to have
3 engaged in the type of independent expenditures authorized by *Citizens United*.
4 — In the absence of information suggesting the union satisfied the conduct prong of
5 the coordination regulations, the union’s campaign activities do not appear to result in
6 prohibited in-kind contributions to Hanabusa 2010. Accordingly, the Commission finds
7 no reason to believe that Hanabusa 2010 accepted prohibited corporate in-kind
8 contributions in violation of 2 U.S.C. § 441b(a).